

# Comment

## Spleen for Sale: *Moore v. Regents of the University of California* and the Right to Sell Parts of Your Body

### I. INTRODUCTION

Medical ethicists and courts today face one of the most controversial issues known to humans in the question of whether people should be allowed to claim a property interest in and to sell their body parts as well as those of others. Those who oppose the sale of body parts raise numerous moral, ethical, and legal concerns.<sup>1</sup> Some fear that the quality of body parts available for transplants will decrease if the sale of body parts is legalized.<sup>2</sup> Others suggest that the availability of free body parts to needy donees will decrease if sales are allowed.<sup>3</sup> Writers express what may be the greatest fear of those who oppose the sale of body parts: if people are allowed to sell their body parts, the poor and indigent will feel forced to sell parts of themselves for money, and as a result, may cause themselves irreparable harm.<sup>4</sup> While these arguments have strong emotional appeal, arguments in favor of the sale of body parts are more compelling.<sup>5</sup> Our donor system is not meeting the great demand for organs. As a result, both economists and physicians have come to realize that a market system of organ sales will bring the benefits of decreased prices and increased quality which are seen in other areas of the open market. In *Moore v. Regents of the University of California*,<sup>6</sup> the judiciary also realized the benefit of allowing the sale of body parts in the context of medical research. In that case, the California Court of Appeals found that a plaintiff could claim part of the income that researchers earned through the sale of research resulting from the use of his unique spleen.

This Comment will examine the *Moore* case and the sale of human body parts. Section II looks at the *Moore* case and how the California Court of Appeals confronted the issue of whether the sale of human body parts should be allowed in a medical research context. Section III and IV of this Comment attempt to give an historical perspective to current attitudes and laws on the sale of body parts and how both have developed over time. Section IV then reviews contemporary case law dealing with property rights in body parts and looks at the conflicts which currently exist between state and federal statutes dealing with the sale of body parts. Section V turns to the moral, ethical, and practical issues involved with allowing the sale of body parts. Section VI looks

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1. See *infra* text accompanying notes 85-133.

2. See *infra* text accompanying note 94.

3. See *infra* text accompanying note 106.

4. See *infra* text accompanying notes 98, 100-01.

5. See *infra* text accompanying notes 102 and 116.

6. 202 Cal. App. 3d 1230, 249 Cal. Rptr. 494 (Cal. Ct. App.), *cert. granted*, 252 Cal. Rptr. 816, 763 P.2d 479 (1988).

at Moore's right to claim a property interest in his spleen and analogizes this right to the publicity rights courts have granted to celebrities. Finally, in section VII, this Comment proposes federal legislation to allow the sale of body parts both for transplant and for research.

## II. *MOORE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA*

In *Moore v. Regents of the University of California*,<sup>7</sup> the California Court of Appeals was one of the few courts in recent history to face the issue of whether the sale of a human's body part should be permitted. The plaintiff, John Moore, sought treatment at the Medical Center of the University of California, Los Angeles (UCLA), for hairy-cell leukemia.<sup>8</sup> Dr. David Golde examined Moore and determined that his spleen had to be removed as a necessary part of Moore's operation for leukemia.<sup>9</sup> At the same time, Dr. Golde consulted with Shirley Quan, a medical researcher and UCLA employee, and determined that Moore's spleen cells were unique and of great commercial value.<sup>10</sup>

Golde and Quan removed Moore's spleen and used genetic engineering to develop a cell-line with an estimated commercial value of three billion dollars without informing Moore or obtaining his consent.<sup>11</sup> Over the course of seven years, Golde and Quan constantly had Moore return to UCLA from Washington State for what they represented to be treatments necessary for Moore's health.<sup>12</sup> Actually, Golde and Quan used these visits to remove samples of Moore's blood, blood serum, skin, bone marrow aspirate, and sperm which were needed for their research.<sup>13</sup> On April 11, 1983, Moore signed a consent form permitting his tissue to be used for research.<sup>14</sup> Neither Golde nor Quan informed Moore of the value of his tissue. In fact, Moore was specifically told by Quan that the tissue had no commercial or financial value.<sup>15</sup> On September 20, 1983, Moore again signed a form consenting to the removal of his tissue, but he expressly denied Golde, Quan, and UCLA the rights to his cell-line.<sup>16</sup> Although Moore did not consent to Golde and Quan's research, they continued to com-

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7. *Id.*

8. *Id.* at 1235, 249 Cal. Rptr. at 498. Leukemia is defined as "[a] disease of the organs of the body which produce white blood cells. It is a fatal disease . . . and is characterized by the appearance in the blood of excessive numbers of white blood cells as well as abnormal cells. . . ." Hairy-cell leukemia is an extremely rare form of leukemia. 2 J. SCHMIDT, *Word Finder* L-61 (1988) and *ATTORNEY'S DICTIONARY OF MEDICINE* and *Word Finder* L-61 (1988).

9. *Moore*, 202 Cal. App. 3d at 1235, 249 Cal. Rptr. at 498.

10. *Id.* at 1236, 249 Cal. Rptr. at 498.

11. A cell-line is developed through the joining together of segments of DNA from human cells with those of a microorganism, like *E. coli* bacteria, to create recombinant DNA. This genetic engineering produces cells which divide and can maintain a continuous culture for an indefinite period of time. *Id.* at 1236 n.3, 249 Cal. Rptr. at 498 n.3.

12. *Id.* at 1238-39, 249 Cal. Rptr. at 500.

13. *Id.*

14. *Id.* at 1239, 249 Cal. Rptr. at 500-01.

15. *Id.* at 1238-39, 249 Cal. Rptr. at 500. The defendants were aware of the great value of Moore's tissue almost immediately after his first visit. *Id.*

16. *Id.* at 1239, 249 Cal. Rptr. at 501.

mercially exploit his cell-line and only responded to Moore's refusal by altering the name of the cell-line to avoid detection.<sup>17</sup>

When Moore eventually discovered the covert actions of Golde and Quan, he brought suit against Golde, Quan, and the Regents of UCLA seeking damages for conversion of his spleen.<sup>18</sup> The trial court in California sustained the defendants' demurrers to the cause of action for conversion and dismissed the case.<sup>19</sup> The California Court of Appeals reversed.<sup>20</sup>

The California Court of Appeals held that Moore's spleen was an item over which he had "an unrestricted right to . . . use, enjoyment and disposition . . ." and thus it fit under traditional legal notions of property.<sup>21</sup> The court also held that Moore could claim that the defendants had converted his tissue. Furthermore, the court ruled that the defendants' assertion that they could claim a property right in Moore's tissue but that he could not was "fraught with irony."<sup>22</sup> Finally, the California Court of Appeals denied the defendants' claim that Moore had abandoned his spleen.<sup>23</sup> The court noted that the potentially "intense moral, religious and ethical concerns" which could accompany the use for sale of a person's body or body part without consent made an inference of abandonment, even with a diseased organ, "inappropriate."<sup>24</sup> The basis for the California Court of Appeals' concern with the moral and ethical ramifications of denying property rights in body parts may lie in the events which occurred in England during a period when no property rights in cadavers were recognized.

### III. HISTORY: THE CADAVER TRADE

In England in the 1820s, an active trade arose in fresh cadavers to supply the great needs of medical and anatomy schools.<sup>25</sup> Because the need was so great, the sale of just one fully grown cadaver brought up to four guineas, eleven times the average weekly wage.<sup>26</sup> "Resurrectionists" obtained these cadavers from local cemeteries and secreted them to the purchasing schools in the dead of the night. Although the trespass and disinterment involved in obtaining these cadavers were crimes, the theft and sale of a cadaver was not considered criminal.<sup>27</sup> One historian noted that a medical student could attend the funeral

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17. *Id.* at 1239-40, 249 Cal. Rptr. at 500-01.

18. *Id.*

19. *Moore v. Regents of Univ. of Cal.*, No. C513755 (Super. Ct. L. A. Co. 1988) (cited by *Moore v. Regents of Univ. of Cal.*, 202 Cal. App. 3d 1230).

20. *Moore*, 202 Cal. App. 3d at 1242, 249 Cal. Rptr. at 502.

21. *Moore*, 202 Cal. App. 3d 1245, 249 Cal. Rptr. at 504 (quoting 63A AM. JUR. 2D PROPERTY § 1 (1984)). Black's Law Dictionary defines property, in the traditional sense, as: "the unrestricted and exclusive right to [dispose of] a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude every-one else from interfering with it." BLACK'S LAW DICTIONARY 1095 (5th ed. 1979).

22. *Moore*, 202 Cal. App. 3d at 1249, 249 Cal. Rptr. at 507.

23. *Id.* at 1253, 202 Cal. Rptr. at 510.

24. *Id.*

25. R. SCOTT, *THE BODY AS PROPERTY* 5 (1981). See also W. ROUGHHEAD, BURKE AND HARE 4 (1948).

26. R. SCOTT, *supra* note 25, at 8.

27. *Id.* at 7.

of a relative on Monday and find the body on the dissecting table by Tuesday or Wednesday, regardless of how eminent the deceased was.<sup>28</sup>

This situation came to a head in Edinburgh in 1827 when two "Resurrectionists" moved their business out of the cemeteries and onto the streets.<sup>29</sup> Lured by the easy money to be had in selling cadavers, two Irishmen named Burke and Hare befriended lonely or derelict people and invited them to their rooming house for a drink.<sup>30</sup> After giving the selected victims a few glasses of whiskey, Burke and Hare killed their victims and sold the bodies to a medical school.<sup>31</sup> Reportedly, Burke and Hare murdered sixteen people this way.<sup>32</sup> The public was outraged by these murders and similar occurrences. In response to the clamor for reform, the British Parliament enacted the Anatomy Act of 1832. This Act imposed sanctions, including imprisonment and fines, for the theft and sale of cadavers.<sup>33</sup> The enactment of the Anatomy Act of 1832 was also a reaction to the gradual common law development of property rights in the body and in body parts.

#### IV. PROPERTY RIGHTS IN THE BODY

##### A. Common Law Property Rights

###### 1. Property Rights in Dead Bodies

Much of the current English and American law relating to a person's property interest in his/her<sup>34</sup> body and body parts evolved from English law on property rights in cadavers. In England during the eighteenth and early nineteenth century, the accepted common law rule stated that there could be no property rights in a dead body.<sup>35</sup> This rule did have some exceptions. For example, the English police could arrest a corpse and hold it until debts of the deceased were paid.<sup>36</sup> An English court found another exception to the rule in the 1882 Chancery Division case of *Williams v. Williams*.<sup>37</sup> In that case, the court faced a claim that Harry Crookendon had directed that his body be given to his "friend" Eliza Williams to be cremated according to the fourth codicil to his will.<sup>38</sup> Crookendon's widow ignored this request and had his body buried.<sup>39</sup> Williams claimed that a property right in her favor existed in the body and sought

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28. *Id.* at 6. See also W. ROUGHEAD, *supra* note 25, at 6.

29. R. SCOTT, *supra* note 25, at 9.

30. *Id.* at 9.

31. *Id.* at 9. See also W. ROUGHEAD, *supra* note 25, at 17.

32. R. SCOTT, *supra* note 25, at 9.

33. *Id.* at 11-12.

34. Hereinafter, this Comment will use the pronouns "he" and "his" to refer to both males and females.

35. P. JACKSON, *THE LAW OF CADAVERS* 128 (2d ed. 1950). This rule had its origins in the seventeenth century proclamation by Lord Coke that the word "cadaver" itself carried the answer to the question of whether property rights exist in a dead body. Cadaver, Coke noted, comes from the Latin phrase "caro data vermibus," which means: "flesh given to the worms." R. SCOTT, *supra* note 25, at 186.

36. P. JACKSON, *supra* note 35, at 128. This is shown by the attachment of the body of the poet Dryden in 1700. *Id.*

37. 20 Ch. D. 659 (1882).

38. *Williams*, 20 Ch. D. 659 (1882). See also P. JACKSON, *supra* note 35, at 46.

39. *Williams*, 20 Ch. D. at 660.

to have the body disinterred and cremated.<sup>40</sup> Although the Chancery Division denied that a property right existed in the body, the court granted Williams "a right to the custody and possession of his [Crookendon's] body . . . until it is properly buried."<sup>41</sup>

When the issue of property rights in dead bodies began to appear in the United States, the courts followed the English common law rule, including the quasi-property rights<sup>42</sup> which English courts had granted for burial purposes. In *Floyd v. Atlantic Coast Line Railway Co.*,<sup>43</sup> the Supreme Court of North Carolina heard an action brought by a mother to recover damages for the negligent mutilation of her deceased son's body.<sup>44</sup> The court reaffirmed the common law rule that there could be no property rights in a corpse.<sup>45</sup> As a result, the North Carolina Supreme Court found that the mother could not claim the railroad's mutilation of her son's corpse caused damage to her property.<sup>46</sup> The court also followed the English courts by recognizing an exception to this rule in the form of a "quasi-property" right belonging to certain relatives of the deceased or to close friends which allows them to bury or to preserve the dead body.<sup>47</sup>

## 2. Property Rights in Living Bodies

While courts did not classify dead bodies as property at common law, living bodies were often categorized as property. Under English common law, a debtor could be attached to act as payment for a debt.<sup>48</sup> Likewise, at common law, a woman's body was the property of her husband.<sup>49</sup> Accordingly, a man who raped a woman was tried for a property crime against her husband.<sup>50</sup> One of the most telling, but also the most uncomfortable, examples of the recognition of property rights in living human bodies at common law is found in the institution of slavery.<sup>51</sup> Although slavery involved ownership of human bodies by other humans, the provision made for this practice in the courts showed a willingness by both courts and legislatures to accept the idea that property rights could exist in a living human body.<sup>52</sup>

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40. *Id.* at 663.

41. *Id.* at 665. See also *The Queen v. Fox*, 114 Eng. Rep. 95 (Q.B. 1841).

42. A "quasi-property right," in this context, refers to the right of family and close friends to claim a corpse for burial purposes—but not for any other reason. P. JACKSON, *supra* note 35, at 159.

43. 167 N.C. 55, 83 S.E. 12 (1914).

44. *Id.* at 56, 83 S.E. at 12.

45. *Id.*

46. *Id.*

47. *Id.* at 57, 88 S.E. at 13.

48. Dickens, *The Control of Living Body Materials*, 27 U. TORONTO L.J. 142, 144 (1977).

49. S. BROWNMILLER, *AGAINST OUR WILL* 16-17 (1975). In Upper Canada, for example, the focus on rape as a property crime against the husband was reflected in new laws enacted by the legislature as late as 1890. C. BOYLE, *SEXUAL ASSAULT* 11-13 (1984).

50. S. BROWNMILLER, *supra* note 49, at 16-17.

51. R. SCOTT, *supra* note 25, at 26-27.

52. See *id.* at 27.

## B. Contemporary Laws

### 1. *An Expansion of Property Rights in Body Parts*

Courts in the United States today are much more willing to accept the concept of property rights in body parts than in the days of the *Floyd* case. In *United States v. Garber*,<sup>53</sup> the Fifth Circuit heard a claim by the Internal Revenue Service against Dorothy Garber for taxes she owed on income earned from selling her blood. Her blood contained a rare antibody used to produce blood-typing serum.<sup>54</sup> Garber argued that plasma has no value and that its exchange produces no financial gain.<sup>55</sup> The Fifth Circuit disagreed and held that "blood plasma . . . like any salable part of the human body, is tangible property. . . ."<sup>56</sup>

In *In re Moyer*,<sup>57</sup> the Supreme Court of Utah heard a case much like *Williams* in which the executor sought to have the decedent exhumed and cremated in accordance with the instructions in his will.<sup>58</sup> The court recognized that a person "has some [property] interest in his body, and the organs thereof, of such a nature that he should be able to make a disposition thereof, which should be recognized and be held to be binding after his death."<sup>59</sup> Not only did the Utah Supreme Court recognize this common law property right, it also acknowledged that the Utah State Legislature codified the property rights of a person in his body and organs when the legislature adopted the Uniform Anatomical Gift Act.<sup>60</sup>

In *Venner v. Maryland*,<sup>61</sup> the Court of Special Appeals of Maryland took the grant of property rights in body parts a step further. The court heard a claim by Charles Venner, an inmate, that his property interest in things that were once a part of his body was violated when the excrements in his bedpan were searched.<sup>62</sup> The Court of Special Appeals held that a person may assert a continuing property right in materials which were once part of or contained in his body.<sup>63</sup> The court included in the list of items to which a property interest could be claimed such things as: "excrement, fluid waste, secretions, hair, fingernails, toenails, blood, and organs or other parts of the body, whether their separation from the body is intentional, accidental, or merely the result of normal body functions."<sup>64</sup> The court limited this property interest by holding that such items are presumed abandoned when discarded, unless a person does some-

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53. 607 F.2d 92 (5th Cir. 1979).

54. *Id.* at 93.

55. *Id.* at 95.

56. *Id.* at 97.

57. 577 P.2d 108 (S.Ct. Utah 1978).

58. *Id.* at 109.

59. *Id.* at 110.

60. *Id.* at 110 n.4. The Uniform Anatomical Gift Act recognizes a person's right to treat his body parts as property in section 2(a) where it states: "Any individual of sound mind and 18 years of age or more may give all or any part of his body for any purpose specified in section 3, the gift to take effect upon death." UNIF. ANATOMICAL GIFT ACT § 2(a), 8A U.L.A. 34 (1968).

61. 30 Md. App. 599, 354 A.2d 483 (Md. Ct. Spec. App. 1976), *aff'd*, 279 Md. 47, 367 A.2d 949, *cert. denied*, 431 U.S. 932 (1977).

62. *Id.* at 605, 354 A.2d at 487.

63. *Id.* at 626-27, 354 A.2d at 498.

64. *Id.*

thing to show an intent to assert his continuing control over the material.<sup>65</sup> Under this standard, Moore's refusal to sign a consent form in *Moore v. Regents of the University of California*,<sup>66</sup> would qualify as an indication of his intent to maintain control over his spleen.

The closest the United States Supreme Court has come to addressing the issue of whether property rights are found in a human cell-line outside of the body was in its 1980 *Diamond v. Chakrabarty*<sup>67</sup> decision. In *Diamond*, the plaintiff, Chakrabarty, claimed that his application for a patent on a micro-organism created through genetic engineering was not precluded by strong precedent against granting patents in living things.<sup>68</sup> The Supreme Court agreed and held that patent protections could be extended to the products of genetic engineering because, although they are living organisms, they are not things that occur naturally on the Earth.<sup>69</sup> Accordingly, a court could also reason that a property right can be exerted in a cell-strain developed from human tissue in a laboratory, as in the *Moore* case.

## 2. Limitations on Property Rights in the Body

The judiciary's expansion of property rights in the human body and in body parts has not been entirely unchecked. In *Schmerber v. California*,<sup>70</sup> the plaintiff claimed that the removal of his blood for a blood alcohol test while he was in the hospital after an automobile accident was an unlawful search and seizure.<sup>71</sup> Schmerber had not consented to this test, and the officer ordering the test did not have a warrant.<sup>72</sup> The United States Supreme Court held that a public official could order a blood alcohol test without consent or a warrant when that official was faced with an emergency and when the delay necessary to obtain a warrant might lead to destruction of evidence.<sup>73</sup>

Likewise, the Supreme Court has limited the scope of a woman's claim to an absolute property right in her body in *Roe v. Wade*.<sup>74</sup> In *Roe*, the Supreme Court was faced with the question of whether a woman could abort her pregnancy and if so, at what point the right to abort a pregnancy ended.<sup>75</sup> The Supreme Court held that a woman did have the right to determine what would be done with her body until the end of the first trimester of her pregnancy.<sup>76</sup> The Supreme Court found that this was the point at which the fetus reaches

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65. *Id.* at 626-27, 354 A.2d at 499.

66. 202 Cal. App. 3d 1230, 249 Cal. Rptr. 494 (Cal. Ct. App. 1988).

67. *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

68. *Id.* at 309. In *Diamond*, the genetic engineering product was a live, human-made microorganism capable of breaking down multiple components of crude oil. *Id.* at 305.

69. *Id.* at 309-10.

70. 384 U.S. 757 (1966).

71. *Id.* at 759.

72. *Id.*

73. *Id.* at 770.

74. 410 U.S. 113, *reh'g denied*, 410 U.S. 959 (1973).

75. *Id.* at 129.

76. *Id.* at 163.

viability and at which the State has a compelling interest in protecting this potential life.<sup>77</sup>

Recently, the Supreme Court further limited a woman's property interest in her unborn child. In *Webster v. Reproductive Health Services*, a plurality of the Court abandoned *Roe's* trimester test as arbitrary and not representative of current medical advances.<sup>78</sup> Moreover, five justices agreed that the state of Missouri could prevent a mother from obtaining an abortion after a doctor determined that the life of the fetus is viable, regardless of the mother's stage of pregnancy.<sup>79</sup> The plurality opinion also indicated that a state's interest in protecting an unborn life should attach before that life becomes viable.<sup>80</sup> By making this determination, the Supreme Court redefined its position on when the state's interest in the mother's body is compelling. This decision did not, however, lessen a person's absolute property interest in his body which exists when the state's interest is less than compelling.

The important thread in these three contemporary cases is that a person's right to assert a property interest in his body is only lost to the State and only when the State can exhibit a strong interest or need. This was not the scenario in the *Moore* case. The Regents of the University of California made no claim that a strong state interest necessitated the use of Moore's spleen cells. In fact, the defendants did not raise any defense involving state action. The sole intent of Golde, Quan, and the Regents of UCLA in using Moore's spleen cells was to further their own research and profit-maximizing interests.<sup>81</sup>

### 3. State and Federal Statutes

State and federal statutes have also narrowed the expansion of property rights in the body and in body parts. Statutory limitations on property rights in body parts have had more of an impact on the *Moore* case than court-imposed limitations because statutory limitations specifically restrict the ability to sell organs. In Maryland, as evidenced by the Maryland Health-General Code, the legislature determined that:

A person other than a non-profit organization that qualifies under section 501(c)(3) of the Internal Revenue Code, may not sell, buy, or act as a broker for a profit in a transfer of any human organ that:

- (i) Is removed from a human body that is alive or dead at the time of removal; and
- (ii) Is not under the exclusive control of the [State Anatomy] Board.<sup>82</sup>

This statute does except the sale of blood from its provisions.<sup>83</sup>

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77. *Id.*

78. 109 S. Ct. 3040, 3056-57 (1989) (Rehnquist, C.J., Plurality), 3064 (Scalia, J., concurring).

79. *Id.* at 3057, 3054-57 (Rehnquist, C.J., Plurality), 3060-64 (O'Connor, J., concurring), 3063 (Scalia, J., concurring).

80. *Id.* at 3075, 3057 (Rehnquist, C.J., Plurality).

81. *Moore v. Regents of Univ. of Cal.*, 202 Cal. App. 3d 1230, 1236, 249 Cal. Rptr. 494, 498 (Cal. Ct. App. 1988).

82. MD. HEALTH-GENERAL CODE ANN. § 5-408(a)(2) (Supp. 1989).

83. *Id.* § 5-408(a)(3) (Supp. 1982).



The Virginia Legislature has likewise prohibited the sale of body parts. Section 32.1-289.1 of the Virginia Code states:

With the exception of hair, blood, and other self-replicating body fluids, it shall be unlawful for any person to sell, to offer to sell, to buy, to offer to buy or to procure through purchase any natural body part for any reason including, but not limited to, medical and scientific uses . . . .<sup>84</sup>

It is possible that many of these state statutes were inspired by the moral outrage which surrounded the organ-brokering proposal of H. Barry Jacobs, a doctor whose license had been revoked in Virginia due to a conviction on mail fraud charges.<sup>85</sup> Jacobs proposed brokering kidneys from healthy live donors.<sup>86</sup> He would sell the organ and then collect a \$2,000 to \$5,000 fee on each transaction. Jacobs also planned to bring indigents from "Third World" nations to the United States to sell their kidneys at a nominal price.<sup>87</sup> Mary Marshall, a delegate to the Virginia Legislature, expressed the enormity of the sentiment against Jacob's proposal when she immediately vowed to pass legislation making the sale of organs from live, healthy donors illegal.<sup>88</sup> Even the prohibition against certain types of organ sales, which was codified in the National Organ Transplant Act, considered the moral problems which arise from allowing sales of organs from live, indigent donors.<sup>89</sup>

The prohibition against organ sales in the National Organ Transplant Act (NOTA) is narrower than the prohibition in the state acts. The NOTA states: "It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce."<sup>90</sup> The NOTA defines the term "human organ" in part (c)(1) as including: "[T]he human (including fetal) kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof and any other human organ (or any subpart thereof, including that derived from a fetus) specified by the Secretary of Health and Human Services by regulation."<sup>91</sup> An examination of this federal statute shows that while the states have acted broadly to prohibit all sales of organs, whether for transplant into a human, or for medical research, the federal statute responds solely to the moral repugnance for plans, such as Jacob's, in which indi-

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84. VA. CODE § 32.1-289.1 (1985); *see also*, DEL. CODE ANN. tit. 16 § 2713(f) (1988).

85. Note, *Regulating the Sale of Human Organs*, 71 VA. L. REV. 1015, 1026-27 (1985).

86. *Id.* at 1021.

87. *Id.*

88. *Id.* at 1026.

89. H.R. Rep. No. 575, 98th Cong., 1st Sess. 9 (1983). The National Organ Transplant Act states as follows:

(a) Prohibition

It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.

(b) Penalties

Any person who violates subsection (a) of this section shall be fined not more than \$50,000 or imprisoned not more than five years, or both. . . .

42 U.S.C. § 274e (1987).

90. *Id.* at § 274e(a) (1989).

91. *Id.* at § 274e(c)(1) (1987).

gent sellers provide organs for wealthy recipients. The NOTA does not ban sales for research.

Even the NOTA's more limited ban on sales of organs for transplant seems to be an extreme reaction. Congress did not do a careful and detailed policy analysis prior to enacting this ban.<sup>92</sup> Rather, the Task Force on Organ Procurement and Transplant explained the ban on sales of organs for transplant by making the conclusory observation that "society's moral values militate against regarding the body as a commodity. . . ."<sup>93</sup>

## V. MORAL, ETHICAL, AND PRACTICAL CONCERNS WITH THE SALE OF HUMAN ORGANS

Moral, ethical, and practical concerns strongly influence the court cases and the state and federal statutes that deal with property rights and the sale of human organs. When courts and commentators examine cases and statutes dealing with property rights in the body or in body parts, they must understand the moral, ethical, and practical influences on the statutes and case law. These issues are the ones most frequently and loudly raised in discussions on whether the sale of body parts should be allowed.

### A. Sales of Organs for Transplant

Opponents of the sale of body parts raise moral and ethical objections based upon three emotional arguments. First, they claim that if human organs are sold, the supply of organs that are diseased or unhealthy will increase significantly.<sup>94</sup> This fear centers around the belief that the poor, those who are malnourished, alcoholics, and drug users will probably comprise the largest group of new donors under a system allowing organ sales.<sup>95</sup> Opponents of organ sales believe that the monetary incentive will encourage people in these groups to misrepresent their medical condition.<sup>96</sup> They say that the increase in "bad" organs received will negate the benefit of an increased supply.

Opponents of organ sales raise a second objection related to allowing the sale of human organs as a market transaction. They feel that it is wrong to trade in human flesh.<sup>97</sup> Opponents of organ sales believe that those who are already disadvantaged by society will be further victimized by being forced to

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92. Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POL., POL'Y & LAW 57, 59 (1989).

93. DHHS, *Rep. of the Task Force on Organ Transplantation: Issues and Recommendations* 96 (1986). This observation by the Task Force seems to overlook the fact that courts have treated some parts of the body as a commodity for a number of years. See *supra* text accompanying notes 48-69. This observation also seems to overlook the fact that replenishable body parts such as hair, blood, sperm, and skin are currently sold in the United States without any overwhelming public outcry. R. SCOTT, *supra* note 25, at 179-97.

94. Note, *Retailing Human Organs Under the Uniform Commercial Code*, 16 J. MARSHALL L. REV. 393, 404 (1983).

95. Brams, *Transplantable Human Organs: Should Their Sale Be Authorized by State Statutes*, 3 AM. J. LAW & MED. 183, 192 (1977).

96. *Id.*

97. Note, *The Sale of Human Body Parts*, 72 MICH. L. REV. 1182, 1222-23 (1973).

sell their organs for needed funds.<sup>98</sup> Jacob's plan to bring people from poor nations to the United States just to sell their organs met its demise because people feel uncomfortable with the ideal that money is used as the basis for determining that one person should have a healthy organ while another should not.<sup>99</sup>

Based upon this feeling of discomfort, authors Calabresi and Melamed have argued that human organs should not be alienable.<sup>100</sup> They describe the emotions people feel when confronted with the concept of selling organs as a "moralism" or an externality<sup>101</sup> in economic terms. Calabresi and Melamed see this moralism as a commodity and they assign it a monetary value.<sup>102</sup> They explain that the external costs of allowing the sale of an organ are so high that no amount of seller compensation will be adequate to offset them.<sup>103</sup> The authors illustrate this argument with an example:

If Taney is allowed to . . . sell a kidney, Marshall may be harmed, simply because Marshall is a sensitive man who is made unhappy by seeing . . . persons who die because they have sold a kidney. Again Marshall could pay Taney not to sell his [kidney]; but again, because Marshall is not one but many individuals, freeloader and information costs make such transactions practically impossible.<sup>104</sup>

Simply put, the argument made by Calabresi and Melamed is that the strong moral objections to the sale of organs as goods may make it economically inefficient to sell organs.<sup>105</sup>

Opponents of organ sales for transplant also raise the argument that such sales would decrease, if not eliminate, the supply of free organs available to people needing transplants.<sup>106</sup> A lack of available free organs might be especially noticable in cases where there is no relation between the donor and the donee.<sup>107</sup> In such a case, the person needing an organ would have to purchase it. Those who oppose the sale of organs for transplant argue that the result is bound to be a further increase in the already high cost of medical care for that person.<sup>108</sup>

While the arguments of those who oppose organ sales have some validity, they are largely based on emotional reactions and they give little consideration to the real dilemmas of patients who need organ transplants to live. If the overwhelming need for organs is considered, the arguments of those who favor allowing the sale of organs for transplant are more compelling. The Uniform An-

98. Note, *supra* note 94, at 404-05.

99. See R. SCOTT, *supra* note 25, at 235-43.

100. Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

101. An "externality" is defined as the side effects of an action that "influence the well-being of non-consenting parties. The non-consenting parties may be either helped (by external benefits) or harmed (by external costs)." J. GWARTNEY & R. STROUP, *ECONOMICS: PRIVATE AND PUBLIC CHOICE* 67 (3d ed. 1983).

102. Calabresi & Melamed, *supra* note 100, at 1109-10.

103. *Id.* at 1109 & n.38.

104. *Id.* at 1112.

105. Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1864-66 (1987).

106. Note, *supra* note 94, at 403.

107. Brams, *supra* note 95, at 191.

108. *Id.* at 191.

atomical Gift Act (UAGA) has clearly failed to provide an adequate number of organs to meet the growing demand for transplants.<sup>109</sup> For example, in 1986, 8,973 kidney transplant operations were performed.<sup>110</sup> At the same time, 11,200 additional individuals who needed transplants were unable to get them due to a severe shortage in kidneys available for transplant.<sup>111</sup> In the early 1970s it was estimated that only about one-tenth of the donors needed to satisfy the future demand for kidneys were carrying donor cards.<sup>112</sup> Likewise, while 1,368 heart transplants were performed in 1986, 600 people were left awaiting transplant due to the short supply of hearts available.<sup>113</sup>

Opponents of organ sales tend to overlook the severity of the problems with the current means of supplying organs. Recall Calabresi and Melamed's hypothetical Marshall, a man who suffered emotional strain in the form of moralisms or externalities because of the possibility that someone who sold his organ might die. If Marshall were faced with the fact that thousands of people actually die each year because organs are not available for transplant, his emotional strain would certainly outweigh the discomfort he might suffer from learning about the possibility of a few deaths.

A market system of organ sales can alleviate many of the supply problems currently faced by people needing transplants. Simple economic analysis shows that where a monetary value is attached to an organ, the available supply increases dramatically.<sup>114</sup> It does not follow, as opponents suggest, that simply by allowing organs to be sold, the quality of organs received will suffer.<sup>115</sup> As with the current system for blood collection, individuals purchasing organs for resale can and will carefully check the quality of their organs and donors so as to maintain the highest quality possible.<sup>116</sup> Again, simple economic analysis shows that once the supply of organs is more plentiful, suppliers providing sub-standard organs will be driven out of the market by their competitors.

In fact, the increased supply of organs available through organ sales could result in more instances where surgeons are able to find the organ that is most closely suited to the needs of the recipient.<sup>117</sup> Frequently, the limited supply of available organs forces surgeons to make a less than ideal "match" between patient and organ.<sup>118</sup> Additionally, the costs of an organ transplant would not be

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109. Note, *supra* note 97, at 1201-02.

110. Am. Couns. on Transplantation (ACT), *U.S. Transplant Stat. Sheet* (1989) (available from Lifeline of Ohio Organ Procurement (LOOP)).

111. *Id.*

112. Note, *supra* note 97, at 1202 (citing estimate of Doctor Samuel L. Kountz of The University of California Medical Center). Current estimates are that only two or three percent of the adult population in the United States carry donor cards. Howard, "How Do I Ask?" *Requesting Tissue or Organ Donations from Bereaved Families*, *NURSING* 89, January 1989, at 70.

113. ACT, *supra* note 110. Similarly, in 1986: 924 liver transplants were performed while 430 people were left awaiting a transplant; 140 pancreas transplants were performed while 50 people were left awaiting a transplant; and 31,000 cornea transplants were performed while 5,000 people were left awaiting a transplant. *Id.*

114. Note, *supra* note 94, at 401.

115. Brams, *supra* note 95, at 192.

116. *Id.*

117. *Id.* at 190. See also Hansmann, *supra* note 92, at 72.

118. Brams, *supra* note 95, at 190.

substantially increased under a system of regulated free market organ sales.<sup>119</sup> In fact, according to the economic rules of supply and demand, as the supply of organs increases, the cost of organs should drop dramatically. In many instances, insurance will pay for the additional costs incurred by the purchase of an organ.<sup>120</sup> It is also possible that the federal government could maintain a combined "altruistic-market" system of organ supply.<sup>121</sup> Through this system, donees needing free organs could be matched with donors willing to provide organs at no cost.<sup>122</sup> The government could further bolster the availability of free organs by offering tax credits to donors equal to the value of the organ donated.<sup>123</sup> Overall, the great need for organs to preserve human lives far outweighs the emotional objections raised by those who oppose the sale of organs.

### B. Sales of Organs for Research

Even those who oppose the sale of organs from live, healthy donors are unlikely to have objections to allowing the sale for research of organs that were removed due to illness. Generally, less furor surrounds the issue of whether organ sales should be allowed for scientific and medical research. As noted above, the National Organ Transplant Act does not prohibit these sales, although some state statutes do.<sup>124</sup> The most common argument against allowing the sale of organs for medical and scientific research was raised by one of the defendants, the Regents of the University of California, in the *Moore* case. The Regents asserted that if patients are allowed to claim the right to sell their organs and tissues to medical researchers, medical research would be impaired.<sup>125</sup> Their claim was that patients would go from institution to institution looking for the highest price for their diseased organs and, if they were dissatisfied with the offers they had, simply prohibit research on the organ entirely.<sup>126</sup>

The California Court of Appeals directly refuted this argument. The court found the researchers' claim that they should be able to assert a property right in tissue and profit from research done on the tissue, while the donor should not, was "fraught with irony."<sup>127</sup> The court also noted that the public policy stated in the Protection of Human Subjects in Medical Experimentation Act favors allowing organ donors to claim a property interest in their bodies.<sup>128</sup> The Act

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119. Note, *supra* note 94, at 404. Paying for an organ does not equate to ending low cost organ transplants. Even under our donor system where organs are free, medical expenses are high and organ transplants are not inexpensive. In 1986, the average cost of various organ transplants were as follows: \$30,000 to \$40,000 for a kidney transplant; \$80,000 to \$140,000 for a heart transplant; \$130,000 to \$200,000 for a heart/lung transplant; \$30,000 to \$40,000 for a pancreas transplant; \$3,500 to \$7,000 for a cornea transplant; and \$80,000 to \$110,000 for a bone marrow transplant. ACT, *supra* note 110.

120. Note, *supra* note 85, at 1033.

121. Note, *supra* note 94, at 405.

122. Brams, *supra* note 95, at 191.

123. Note, *supra* note 85, at 1036.

124. 42 U.S.C. § 274e (1989); VA. CODE § 32.1-289.1 (1985); MD. HEALTH-GENERAL CODE ANN. § 5-408 (Supp. 1989).

125. *Moore v. Regents of Univ. of Cal.*, 202 Cal. App. 3d 1230, 1251, 249 Cal. Rptr. 494, 508 (Cal. Ct. App. 1988).

126. *Id.* at 1251, 249 Cal. Rptr. at 508.

127. *Id.* at 1249, 1251, 249 Cal. Rptr. at 507, 509.

128. *Id.* at 1248, 249 Cal. Rptr. at 506.

mandates that medical experiments on human bodies "shall be undertaken with due respect to the preciousness of human life and the *right of individuals to determine what is done to their own bodies*."<sup>129</sup>

Additionally, the Edinburgh murders of 1827 provide a strong argument for allowing donors to sell their organs for research. English medical schools needed cadavers so that their students could do research and this led to the proliferation of a trade in cadavers.<sup>130</sup> The prevalence of corpse stealing as a means to meet demand for cadavers resulted from the fact that, even though it was illegal to disinter a corpse, it was not illegal to possess one.<sup>131</sup> Once the corpse reached the hands of a medical school, the school had as much of an interest in the body as did the grieving relatives.

People are outraged when confronted with the possibility of such a loss of control over their body or the body of a loved one.<sup>132</sup> As the California Court of Appeals noted in *Moore*, many people have moral, ethical, and religious objections to research being performed on human tissue.<sup>133</sup> If surgery patients, like Moore, are denied the right to sell their organs to medical researchers, they not only lose the right to claim the profits reaped from the use of their organs, but also they are likely to lose their best means of controlling the disposition of their organs.

## VI. MOORE'S "RIGHT OF COMMERCIALITY" IN HIS SPLEEN

Legal scholars who oppose the sale of body parts may make the argument that allowing such sales would break with case law precedent. This is not true. U.S. courts have frequently affirmed the fact that property rights can exist in the human body.<sup>134</sup> As discussed above, in *United States v. Garber*,<sup>135</sup> the Fifth Circuit recognized that a person may sell a part of his body, such as plasma. The court even found that funds obtained from such a sale must be declared as taxable income.<sup>136</sup> In *Venner v. Maryland*, the Maryland Court of Special Appeals found that a person may have a continuing property interest in an item traditionally considered a "waste" if it was once a part of or inside of his body.<sup>137</sup> The court required only that the person claiming a property interest do something to indicate his desire to maintain ownership of that item.<sup>138</sup> In *Moore*, Moore's desire to have a continuing property interest in his spleen was

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129. *Id.* (emphasis added by the California Court of Appeals).

130. R. SCOTT, *supra* note 25, at 5.

131. *Id.* at 7.

132. The people of Edinburgh were so horrified at the acts of Burke (Hare was granted immunity because he turned state's evidence) that, after his conviction for the murders, he was hanged before a crowd of 20,000 to 37,000 people. When Burke was dead, his body was delivered to Dr. Alexander Munro, Professor of Anatomy at the University of Edinburgh, for public dissection. One report noted that after the dissection the classroom, "had the appearance of a butcher's slaughter house, from its blood flowing down and being trodden on." *Id.* at 10.

133. *Moore*, 202 Cal. App. 3d at 1253, 249 Cal. Rptr. at 510.

134. *In re Estate of Moyer*, 577 P.2d 108, 110 (Utah 1978).

135. 607 F.2d 92, 97 (5th Cir. 1979).

136. *Id.* at 97.

137. 30 Md. App. 599, 626-27, 354 A.2d 483, 498-99.

138. *Id.*

evidenced by his refusal, even before he was fully aware of the value of his tissue, to grant the researchers rights in his cell-line.

The judiciary's recognition of continuing property rights in human body parts militates against the researchers' claims in *Moore* that the plaintiff had abandoned his spleen as waste.<sup>139</sup> In fact, the California court found that precedent speaks in favor of Moore's claim that the defendant researchers converted his property. Conversion is defined as "the unlawful and wrongful exercise of dominion, ownership or control by one person over the property of another, to the exclusion of the exercise of the same rights by the owner, either permanently or for an indefinite time."<sup>140</sup> The researchers' continued experiments on Moore's spleen, even after his exercise of dominion over it, placed their actions within the definition of conversion.

The state statutes that prohibit the sale of organs for both transplant and research do not speak well for the argument that Moore had a right to sell his spleen.<sup>141</sup> These statutes appear, however, to represent an overly-broad reaction to public outrage over schemes proposing to buy organs from healthy poor donors for transplant into sick wealthy donees. This is not the scenario in *Moore*. Moore's spleen had to be removed as a part of his treatment for leukemia.<sup>142</sup> Allowing Moore to sell his spleen, rather than permitting the researchers to just take it, merely gives Moore the right to control the disposition of his own tissue and allows him to share in the three billion dollar profit resulting from its uniqueness.<sup>143</sup> This right is not prohibited under the National Organ Transplant Act as the statute only governs organs used "in human transplantation."<sup>144</sup>

Moore can also argue that he had a right to the commercial benefits of his spleen through an analogy to the right of publicity.<sup>145</sup> The right of privacy and the right of publicity are often confused. While the right of privacy involves a person's right "to be left alone," the right of publicity protects the monetary value of a celebrity's name and characteristics.<sup>146</sup> By granting a right of publicity, courts endeavor to protect the traits of an individual that are unique to that individual from unauthorized commercial exploitation.<sup>147</sup> Similarly, a person could be allowed to claim a "right of commerciality" in a part of his body when that part was exploited for profit by an unauthorized person.<sup>148</sup> If courts apply the right of commerciality in this context, they avoid several key objections

139. *Moore v. Regents of Univ. of Cal.*, 202 Cal. App. 3d 1230, 1252-55, 249 Cal. Rptr. 494, 509-10 (Cal. Ct. App. 1988).

140. *Pugh v. Hassell*, 206 Okla. 290, 291, 242 P.2d 701, 702 (1952) (citing *Griffith v. McBride*, Adm'x., 188 Okla. 227, 108 P.2d 109).

141. *Id.* MD. HEALTH-GENERAL CODE ANN. § 5-408 (Supp. 1989); VA. CODE § 32.1-289.1 (1985).

142. 202 Cal. App. 3d at 1235, 249 Cal. Rptr. at 498.

143. *Id.* at 1253, 1236, 249 Cal. Rptr. at 499, 510.

144. 42 U.S.C. § 274e (1989).

145. *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953).

146. *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 729 (S.D.N.Y. 1978); see also 63A AM. JUR. 2d *Property* § 8 (1984).

147. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1201 (1986).

148. Comment, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 UCLA L. REV. 207, 260 (1986).

raised by those who oppose the sale of body parts. For example, such an application would not lead to a property interest in organs that are used for pure, non-profit research.<sup>149</sup> Nor would the property interest apply to charitable donations of organs.

The right of commerciality also directly parallels the personality interest in protecting the unique characteristics of an individual. The judges of the California Court of Appeals clearly stated that Moore's cell-line was valuable because his tissue was unique.<sup>150</sup> The court noted, "[w]ithout these small indispensable pieces of plaintiff, there could have been no \$3 billion cell-line."<sup>151</sup> Based on this view of Moore's tissue, a court should not view a cause of action for appropriation of the commercial value of a person's genetic structure as too far removed from the courts' current recognition of the right of a person to claim appropriation of his unique likeness or persona.

## VII. ORGAN LEGISLATION PROPOSAL AND CONCLUSION

### A. *Proposal*

Congress can solve the severe organ shortages in the United States by enacting broad legislation that allows for the sale of body parts. This legislation should require federal regulations and agencies within the Food and Drug Administration to monitor the organizations selling body parts and the quality of the parts sold. The federal government should also make organ sales a regulated industry subject to price ceilings similar to those that were imposed on airlines in the past. In addition, Congress should provide tax breaks for true "donors" of organs in order to insure that there continues to be a free supply of organs available to the needy. This proposal will certainly arouse a great deal of opposition and will take time to enact. In spite of the obstacles, the benefits of an increased supply of organs are worth the wait. Presently, thousands face the possibility of death each year because of the inadequacy of the current donor system of organ supply.

The facts of the *Moore* case can be addressed by Congress in a far less controversial way. In *Moore*, the organ in question was not healthy and it was not going to be sold for transplant. The National Organ Transplant Act (NOTA) allows the sale of organs for research. This aspect of the NOTA should be adopted by the states. The state statutes which currently prohibit the sale of organs in many states were drafted broadly and were a reaction to sales of organs from healthy donors for transplant. National legislation allowing for the sale of organs removed due to disease or for other health reasons would not encounter the same kind of opposition. Additionally, if states allow the sale of organs that have been removed for health reasons, patients like Moore will be able to claim a more significant role in determining how their body parts are used once they are out of their body.

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149. *Id.* at 262.

150. *Moore v. Regents of Univ. of Cal.*, 202 Cal. App. 3d 1230, 1249, 249 Cal. Rptr. 494, 507 (Cal. Ct. App. 1988).

151. *Id.*



## B. Conclusion

Courts in the United States agree that a property right exists in the human body and in its many parts. Yet, courts have not achieved a consensus on how this property right is to be applied in cases involving the sale of body parts for transplant and for medical research. As a result, the decision of the California Court of Appeals in *Moore v. Regents of the University of California*,<sup>152</sup> could initially be considered controversial. Closer examination, however, evidences that this decision is firmly rooted in precedent. Case law shows that courts have recognized a person's right to claim a property interest in his body parts which includes a right to sell those parts. Some state statutes have taken a broad view which prohibits all sales of body parts, even for research. The National Organ Transplant Act takes a more reasonable approach by only prohibiting the sale of organs for transplant and not for research. This approach reflects the fact that courts do recognize the importance of protecting the genetic makeup of a person. The protection of a person's genetic characteristics is not far removed from the protection of a person's name and persona which is currently granted by courts. Thus, the protection of Moore's property interest in his spleen granted by the California Court of Appeals in *Moore v. Regents of the University of California*<sup>153</sup> was not a break from precedent but instead a correct and reasonable approach. Moore did have a protectable property interest in his spleen and he should be allowed to share in the profits resulting from the cell-line developed from it.

*Stephen Ashley Mortinger*

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152. 202 Cal. App. 3d 1230, 249 Cal. Rptr. 494 (Cal. Ct. App. 1988).

153. *Id.*

